Filed 10/13/09 Andres Z. v. Superior Court CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ANDRES Z., Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES Real Party in Interest.	B216351 (Los Angeles County Super. Ct. No. CK71638)

ORIGINAL PROCEEDINGS, petition for writ of mandate. Elizabeth Kim, Juvenile Court Referee. Petition granted.

Law Offices of Katherine Anderson, Jesse McGowan and Omid Pouya for Petitioner.

James M. Owens, Assistant County Counsel, and O. Raquel Ramirez, Deputy County Counsel, for Real Party in Interest.

Petitioner Andres Z. (Father), father of A., contends in his petition for writ of mandate that the juvenile court erred in terminating his reunification services at the 12-month review hearing because the Department of Children and Family Services (DCFS) failed to meet its burden of establishing that reasonable services were provided. We agree and grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Petition and Amended Petition*

In February 2008, A., then four years old, was detained from his mother, Kristen B. (Mother), along with three older half-siblings.[1] According to the allegations of the petition, A. was found by authorities wandering the streets unsupervised and unkempt, and Mother's home was found to be dirty to the point of being unsanitary.[2] Mother was alleged to be a user of methamphetamine.[3] The caseworker received information that Father was incarcerated. The sole allegation pertaining to Father in the original petition alleged that Father had failed to provide A. with the necessities of life.[4] A. was eventually placed in the home of a paternal uncle and aunt.

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[1] The three half-siblings, the children of Gabriel L., are not involved in this appeal. Mother is not a party to this appeal.

[2] Four prior referrals of neglect and abuse involving Mother had been investigated and deemed unfounded or inconclusive. In addition, in June 2006, Mother had participated in voluntary family maintenance services, including drug testing. Mother's tests were negative and services were discontinued in December 2006.

[3] Mother repeatedly denied using drugs, but reported she was depressed and overwhelmed from caring for her elderly mother and four children, one of whom -- A.'s half sibling, M.L. -- suffered from autism. Mother reported getting no financial assistance from the children's fathers.

[4] In March 2008, the court found that Father was A.'s presumed father.

A few days after the petition was filed, the caseworker located Father in Lancaster State Prison. Father's expected release date was August 2008. The caseworker provided a telephone number to the prison counselor along with instructions for Father to call her, but Father did not call. The caseworker learned that Father's parental rights had been severed with respect to an older child, A.T., in 1999. Consequently, the caseworker recommended no reunification services for Father in the jurisdictional/dispositional report and in the supplemental report, both prepared in March 2008. While in prison, Father signed a waiver indicating he did not wish to be transported to the jurisdictional/dispositional hearing, scheduled to take place on March 26, 2008. Despite the waiver, Father appeared at the March 26 jurisdictional/dispositional hearing and indicated he would be out of custody by August. Because DCFS had been unable to interview him while he was in prison, the court continued the hearing.[5]

Sometime after the March 26 hearing, Father was released and placed on parole. He was interviewed by the caseworker on April 2. He claimed to have given Mother money over the years and to have bought food for the family and taken A. shopping for clothing. He denied abusing drugs or having a problem with alcohol and denied ever seeing Mother use drugs. He also said that he had helped Mother clean the house in the past. A few days later, DCFS amended the petition to add the allegation that Father had an extensive criminal history and that his

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[5] Respondent contends that Father's appearance at this hearing, together with the lack of a removal order in the record, indicates he was released from prison prior to March 26. At the hearing, the court inquired when Father "anticipate[d] being released from custody," and Father responded: "At the very latest[,] probably [by] the end of August." Accordingly, we accept Father's counsel's representation that he was in custody at that time.

parental rights to an older child had been severed.[6] In the April 2008 interim review report, the caseworker continued to recommend no reunification services for Father because of his prior failure to reunify with his older child.

At the April 7, 2008 jurisdictional/dispositional hearing, the parties reached an agreement concerning jurisdiction. DCFS agreed to strike the allegation that Father's parental rights to an older child had been severed. Father signed a waiver agreeing not to contest the petition. In accordance with the parties' understanding, the court found true the allegation that Father had failed to provide the necessities of life to A. and struck the allegation regarding Father's failure to reunify with the older child.[7] Turning to disposition, the court ordered reunification services for Father -- "a DCFS approved program of parent education and individual counseling to address criminal lifestyle." The court scheduled a May 27 progress hearing.

The transcript for the May 27 hearing is not included in our record. However, in the May 27, 2008 interim review report, the caseworker reported that she had met with Father on April 25 and provided referrals for the relevant programs (parenting and individual counseling).

B. *Six-Month Review Hearing*

In the October 6, 2008 status review report which preceded the six-month review hearing, the caseworker reported that Father was once again incarcerated --

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[6] Records indicated Father had been convicted of: disorderly conduct in 1988; misdemeanor weapons charges in 1988 and 1989; carrying a concealed weapon in 1993; providing false identification to a peace officer in 1995; assault with a deadly weapon other than a firearm in 2003 and 2004; and driving with a suspended license in 2003.

[7] The sustained allegation also stated that Father was incarcerated, although that was apparently not true at the time of the jurisdictional/dispositional hearing.

at the California Rehabilitation Center in Norco.[8] Interviewed in June 2008, prior to his re-incarceration, Father had said that he wanted Mother to have custody of A. The caseworker reported that Father was non-compliant with all court-ordered programs. The caseworker reported no face-to-face visitation between Father and A., but stated that prior to his incarceration, Father had had regular telephone contact with his son.

The October 6 status review report contained inaccurate information with respect to Father. It stated that he was only an alleged father. Moreover, although the court had stricken the allegation concerning Father's failure to reunify with A.'s half-sibling and ordered reunification services for Father, the report's recommendation stated that no reunification services should "be offered" to Father because of the prior severance of parental rights.

At the hearing on October 6, counsel for DCFS interpreted the status review report's recommendation that no reunification services "be offered" as the caseworker's determination that reunification services for Father should be terminated. Counsel for Father did not raise any issues concerning the wording of the status review report's recommendation or the notice served on Father.[9] However, counsel for the children informed the court that the information in the report appeared to have been cut and pasted from earlier reports in an inappropriate fashion. In addition, counsel for Gabriel, the father of A.'s half-siblings, stated that the report contained erroneous information concerning the requirements of Gabriel's reunification program. The court put the matter over and instructed

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[8] Neither this report nor any report that followed stated when Father was re-incarcerated or the reason, or indicated when Father was expected to be released.

[9] The notice to Father and the other parties regarding the October 6 hearing stated that there was "[n]o [recommended] change in orders, services, placement, custody, or status."

DCFS to prepare a supplemental report, specifically addressing the services offered to Father. Because Father was not present, the court also ordered that he be given notice of the continued hearing.

The caseworker prepared a new report dated October 20, 2008, which contained no new information concerning Father. It reiterated that Father had been provided referrals on April 25 and interviewed in June, that he was non-compliant, and that he had had regular telephonic contact with A. prior to his re-incarceration. The report contained no indication that the caseworker had attempted to contact Father at the Rehabilitation Center or to determine what services were available to him there. The caseworker re-stated the recommendation that no reunification services "be offered" to Father due to the stricken allegation concerning the prior dependency matter. The new notices sent to the parties by the caseworker stated that there was "no change" in recommended orders, services, placement, custody or status.

The reporter's transcript of the hearing on October 20, 2008, is not included in our record. According to the order of that date, the court found that notice had been provided as required by law and that DCFS had provided reasonable services. In addition, the court found there was a substantial probability that the minors (A. and his half-siblings) could be returned to their parents by the 12-month review date, that "the parents" consistently and regularly visited the children, and that "the parents" had made significant progress in resolving the problems that led to the removal of the children.[10] Accordingly, the court set a 12-month review hearing.

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[10] We note that although the court's order appears to refer to all three parents, there was no evidence to support that Father had consistently and regularly visited A. or that he had made significant progress in resolving the problems that led to his removal. (See *M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, 179 [court has discretion at six-month review hearing to continue services and set 12-month review hearing, even where

C. *12-Month Review Hearing*

In the April 20, 2009 report prepared in advance of the 12-month review hearing, the caseworker reported that Father was still incarcerated at the Rehabilitation Center in Norco. The report stated that in March 2009, Father had written to the caseworker seeking help in getting his son back. Father provided proof that since October 2008, he had been participating in programs at the Rehabilitation Center which appeared to satisfy the court's dispositional order. He attended a program to address substance abuse five days a week, four hours a day. Father had completed three of the four phases of that program. Father also supplied certificates received for completing an eight-week parenting class and ten-week anger management and substance abuse and domestic violence and substance abuse courses. There is no evidence that the caseworker contacted Father or anyone at the institution either before or after receiving his letter. The report stated that Father "is in complian[ce] with all Court ordered programs except for visitation orders due to [F]ather being incarcerated." The report's recommendation continued to state that no services should "be offered" to Father due to the prior failure to reunify. The notices that were served in advance of the April 20, 2009 hearing stated that there was "[n]o change" in the recommendation with respect to services or orders.

At the April 20 hearing, the court stated that notice had been given as required by law. Counsel for Mother objected, pointing out that the notices had said there was no change in the recommendation regarding services, but that in fact DCFS was recommending termination for Mother. Counsel for DCFS conceded the point and the matter was put over.

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parent has made no substantive progress and evidence does not support substantial probability that child will be returned at that time].)

The caseworker prepared a supplemental report dated May 11, 2009. The report recommended that services be terminated with respect to Mother, but contained no recommendation with respect to Father. The notices sent to the parties stated that the recommendation regarding Mother had been changed, but said nothing regarding Father. At the continued hearing on May 11, the court again found that notice had been given as required by law. Counsel for Father stated that there was "some confusion" because the April 20 report's recommendation was to "terminate F[amily] R[eunification]" for Father, but the report said "'Father has complied with the case plan.'" The court stated that the recommendation was to terminate with respect to both Mother and Father and asked whether any counsel present wished to be heard.[11] Hearing nothing further from counsel for Mother or Father, the court terminated services for both, finding there was no substantial probability that the children could be returned by the 18-month review date because "the parents have not consistently and regularly visited the children and have not made significant progress in resolving the problems that led to the removal of the children and have not demonstrated the capacity and ability to complete the objectives of the treatment plan and to provide for the children's safety, protection, physical and emotional health." The court further found that "reasonable services have been provided to meet the needs of the minor(s)" and that Father "is not in compliance with the case plan." The court gave no basis for the latter finding, which contradicted the caseworker's report.

After the court made its findings and issued its rulings, counsel for Father stated that termination of reunification services was over Father's objection. The court noted the objection and set a hearing under Welfare and Institutions Code

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[11] Counsel for DCFS stated her belief that services had already been terminated with respect to Father. Counsel for Father clarified that despite DCFS's recommendation, the court had ordered further services on October 20, 2008. The court reviewed the October 20 order and confirmed that Father's services had not been terminated.

section 366.26 to address termination of parental rights over A.[12] Father noticed his intention to seek review by way of petition for writ. By order dated July 28, 2009, this court stayed the section 366.26 hearing and directed real parties to show cause why the relief requested should not be granted.

DISCUSSION

A. *Grounds for Termination of Reunification Services and Standard of Review*

Section 366.21, subdivision (f) permits the court at the 12-month review hearing to either terminate family reunification services and set a section 366.26 hearing or to continue services for an additional six months and hold an 18-month review hearing. Generally, the court may choose the latter course only if it finds "that there is a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time."[13] (§ 366.21 at (g)(1).) However, the court must also continue the case for an additional six months if it finds that "reasonable services have not been provided to the parent or legal guardian." (*Ibid.*; see also § 366.21, subd. (f).) "The court may not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian." (§ 366.21,

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12 Statutory references are to the Welfare and Institutions Code.

13 In order to make that finding, there must be evidence that: "the parent or legal guardian has consistently and regularly contacted and visited with the child"; "the parent or legal guardian has made significant progress in resolving problems that led to the child's removal from the home"; and "[t]he parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs." (§ 366.21, subd. (g)(1).)

subd. (g)(1).) Even when a parent is incarcerated, "[c]ourts may not initiate proceedings to terminate parental rights unless they find adequate reunification services were provided." (*Robin V. v. Superior Court* (1995) 33 Cal.App.4th 1158, 1164.)

"At review hearings, the agency bears the burden of proof." (*David B. v. Superior Court* (2006) 140 Cal.App.4th 772, 779.) Specifically, the burden is on the agency at the 12-month review hearing to show by clear and convincing evidence that reasonable reunification services were provided. (*Robin V. v. Superior Court, supra,* 33 Cal.App.4th at p. 1165; *In re Marilyn H.* (1993) 5 Cal.4th 295, 308.) On appeal, "'[a]ll reasonable inferences must be drawn in support of the findings and the record must be viewed in the light most favorable to the juvenile court's order. [Citation.]'" (*In re Maria S.* (2000) 82 Cal.App.4th 1032, 1039, quoting *In re Jeannette S.* (1979) 94 Cal.App.3d 52, 58.)

B. *Reasonable Reunification Services Were Not Provided to Father*[14]

"'[F]amily preservation is the first priority when dependency proceedings are commenced.'" (*M.V. v. Superior Court, supra,* 167 Cal.App.4th at p. 174,

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[14] Respondent contends Father forfeited the issue of provision of reasonable services because his counsel did not specifically raise the issue at the May 11, 2009 hearing. "'Generally, points not urged in the trial court cannot be raised on appeal. [Citation.] The contention that a judgment is not supported by substantial evidence, however, is an obvious exception to the rule.'" (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623, quoting *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17.) With respect to factual issues on which the agency bears the burden of proof, "the parent is not required to object to the lack of substantial evidence in order to preserve the issue for appeal." (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1560.) As discussed above, before the court may terminate reunification services and set a section 366.26 hearing, DCFS must prove it provided reasonable reunification services to the parent. In his petition, Father challenges the court's finding that reasonable reunification services were provided on substantial evidence grounds. This issue was not forfeited.

quoting *In re Lauren Z.* (2008) 158 Cal.App.4th 1102, 1112.) "To that end, '[w]hen a child is removed from a parent's custody, the juvenile court ordinarily must order child welfare services for the minor and the parent for the purpose of facilitating reunification of the family.'" (*M.V. v. Superior Court*, *supra*, at p. 174, quoting *Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 843.) Provision of reunification services "'implement[s] "the law's strong preference for maintaining the family relationship if at all possible." [Citation.]'" (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1228, quoting *In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1787.) An incarcerated parent is as entitled to reunification services as any other parent, unless "the court determines, by clear and convincing evidence, those services would be detrimental to the child." (§ 361.5, subd. (e)(1); see *In re Monica C.* (1995) 31 Cal.App.4th 296, 305; *In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1406.)[15]

Reasonable reunification services for an incarcerated parent include, but are not limited to, "[m]aintaining contact between the parent and child through collect telephone calls" and transportation and visitation services, "where appropriate." (§ 361.5, subd. (e)(1)(A)-(C).) In addition, the caseworker must contact the institution to determine what specific services are available to the incarcerated parent and whether there is any way to make additional services available. (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1012-1013.) The caseworker is

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[15] The pertinent factors the court is required to consider when determining whether provision of services would be detrimental to the child of an incarcerated person, include "the age of the child, the degree of parent-child bonding, the length of the sentence, . . . the nature of the crime . . . , the degree of detriment to the child if services are not offered, . . . [and] the likelihood of the parent's discharge from incarceration . . . within the reunification time limitations described in [section 361.5] subdivision (a)." (§ 361.5, subd. (e)(1).) The court made no such finding here. Indeed, it could not have, as the record is devoid of any information concerning the degree of bonding between Father and A., the length of Father's sentence or the nature of Father's crime.

also required to maintain reasonable contact with the parent throughout the reunification period. (*Id*. at p. 1015; see *In re Riva M*. (1991) 235 Cal.App.3d 403, 414 [agency establishes provision of reasonable services where record shows agency "identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained reasonable contact with the parents during the course of the service plan, and made reasonable efforts to assist the parents in areas where compliance proved difficult"], italics deleted.) "[T]he [agency] is not excused from offering or providing court-ordered reasonable reunification services [to incarcerated parents] because of difficulties in doing so or the prospects of success." (*Mark N. v. Superior Court*, *supra*, at p. 1015.) "The [incarcerated parent] [is] not required to complain about the lack of reunification services as a prerequisite to the [agency's] fulfilling its statutory obligations." (*Id*. at p. 1014.)

We find no substantial evidence to support the court's finding that DCFS provided reasonable reunification services to Father during the period preceding the 12-month review hearing or, indeed, at any time subsequent to his re-incarceration.[16] The record contains no evidence of any attempt to arrange for visitation or telephone calls between Father and A. There was no evidence that the caseworker contacted Father after August 2008 -- nearly ten months before the 12-month review hearing was held. Moreover, even after Father wrote to the caseworker, providing the name and contact information for his program manager

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[16] The last reported interview with Father occurred in June 2008. The caseworker's log indicated she had face-to-face meetings with Father in July and August 2008, but the report did not discuss what, if anything, was discussed or accomplished at those meetings. Respondent asserts in its brief that reasonable services were provided, but the evidence it proffers in support of that proposition confirms that there was no attempt to contact Father after August 2008, and that the caseworker never contacted the Rehabilitation Center or anyone involved in Father's counseling.

and certificates for the programs he had completed, the caseworker did not contact the Rehabilitation Center or anyone involved in Father's rehabilitation to ascertain the nature of the programs and whether they complied with DCFS requirements. Additionally, nothing in the reports documents the reason for Father's re-incarceration or his potential release date.

In *In re Brittany S., supra,* 17 Cal.App.4th at p. 1399, the appellate court found services inadequate where the agency failed to arrange visitation between the incarcerated parent and her child and "did not even bother to monitor [her] progress in [the prison] programs." (*Id*. at p. 1407.) In *Mark N. v. Superior Court*, the appellate court reversed a juvenile court's finding of adequate reunification services where the caseworker failed to answer the incarcerated parent's letters and failed to contact him during 13 months of the 17-month reunification period. (*Mark N. v. Superior Court, supra,* 60 Cal.App.4th at p. 1012.) In *Robin V. v. Superior Court*, the court deemed services inadequate where the caseworker "never reviewed [the incarcerated parent's reunification] plan with him or gave him advice on programs he could or should be doing to secure his parental rights." (*Robin V. v. Superior Court, supra*, 33 Cal.App.4th at p. 1165.) In *Amanda H. v. Superior Court* (2008) 166 Cal.App.4th 1340, the caseworker failed to determine whether the parent's counseling program satisfied the case plan until it was too late for her to complete the required counseling. The same deficiencies are present here. The caseworker made no attempt to contact Father or his counselors to ascertain whether the programs met DCFS's and the court's requirements or whether Father's efforts were sincere or likely to be successful. As a result, the caseworker had no basis on which to make a recommendation that services be continued or terminated. These deficiencies require reversal of the order terminating reunification services and remand for provision of reasonable services.

C. *DCFS Did Not Provide an Adequate Pre-Hearing Report*

Father also contends that the pre-hearing reports were inadequate because they did not contain a recommendation concerning the termination of reunification services. Although the failure to provide reasonable services, without more, justifies reversal, we address the adequacy of the pre-hearing reports to provide guidance to the court.

Section 366.21, subdivision (c) requires the caseworker to file a report in advance of every review hearing "regarding the services provided or offered to the parent . . . to enable him or her to assume custody . . . ; the progress made; and, where relevant, the prognosis for return of the child to the physical custody of his or her parent or legal guardian; and shall make his or her recommendation for disposition." California Rules of Court, rule 5.715 provides that before the 12-month review hearing, "the petitioner must prepare a report describing services offered to the family and progress made" and further provides that "[t]he report must include: [] Recommendations for court orders and the reasons for those recommendations . . . ." Section 366.21, subdivision (f) requires the court to "review and consider" the caseworker's "report and recommendations" in making its determination whether to terminate services or continue the matter for an additional six months.

None of the reports that preceded the 12-month review hearing contained a recommendation with respect to whether Father's reunification services should be terminated. All but the final report, which contained no recommendation at all, simply repeated the language of the jurisdictional/dispositional report and other earlier reports recommending that services not "be offered." The court and the parties chose to interpret the quoted language as recommending that services "be terminated." Assuming their interpretation was correct, the only reason given for termination was not a valid one -- the allegation concerning the prior dependency

case involving Father had been stricken at the jurisdictional/dispositional hearing per the parties' agreement, and the court was never asked to determine the truth of the allegation. Although the court ordered reunification services for Father at the March 26, 2008 hearing and Father provided evidence of substantial compliance in March 2009, there is nothing to suggest that the caseworker considered Father's progress or capacity for change prior to the 12-month review hearing or offered the court a bona fide recommendation based on the information available at the time.

The parties address the report's deficiencies as if this issue were merely a matter of inadequate notice. However, caseworker reports are the "cornerstone[s] of the evidentiary structure" upon which the court's decisions are made. (*In re Crystal J*. (1993) 12 Cal.App.4th 407, 413 [referring to section 366.26 assessment report].) Deficiencies in a required report "go to the weight of the evidence, and if sufficiently egregious may impair the basis of a court's decision . . . ." (12 Cal.App.4th at p. 413; accord, *In re Valerie W*. (2008) 162 Cal.App.4th 1, 14.) Here, the report's deficiencies not only deprived Father of his right to notice, but also undermined the court's factual rulings. On remand, the court should ensure that reports prepared by the caseworker and offered into evidence by DCFS comply with the requirements of the statutes and rules.

DISPOSITION

The petition is granted. The stay order is lifted. The juvenile court is ordered (1) to vacate its order of May 11, 2009 terminating Father's reunification services and setting a section 366.26 hearing, and (2) to extend Father's reunification services as required by section 366.21, subdivision (g)(1).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.